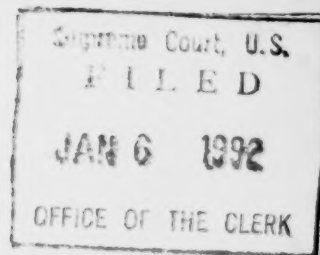


(5)
No. 91-556



IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

JANA, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**Petition For Writ of Certiorari To The United States
Court Of Appeals For The Federal Circuit**

REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

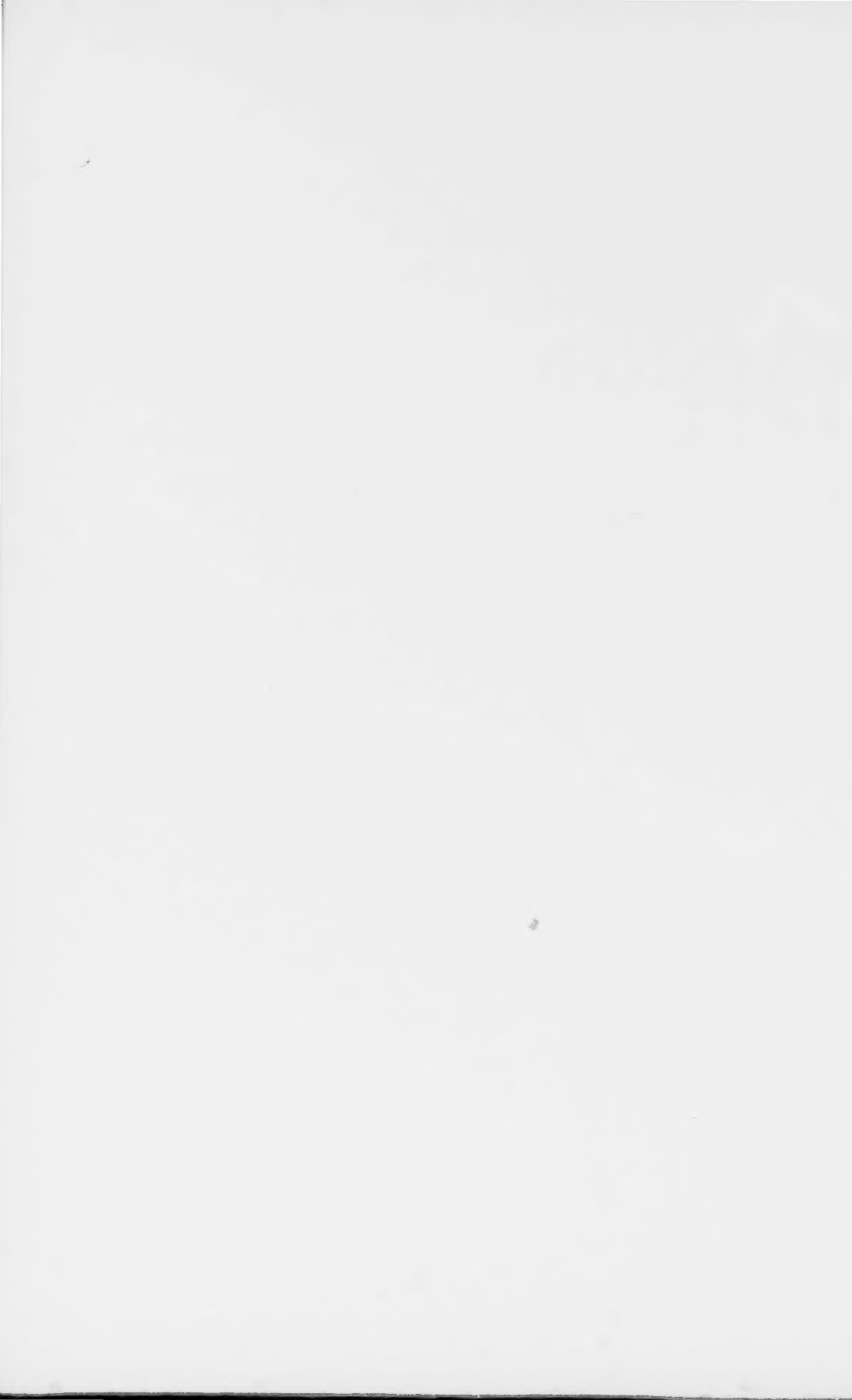
1. Whether a contractor's constitutional due process rights are violated by the application of a new, judicially-created irrebuttable presumption that costs were not incurred if certain records documenting the costs are not available for audit.
2. Whether a contractor's inadvertent failure to comply with its record-keeping obligation requires forfeiture of all payments in issue, or whether a contractor may retain all or part of those payments in restitution for its actual past performance.
3. Whether the Government may require repayment of costs based on an untimely audit.

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Statement of the Case

Without endorsing other aspects of the Brief for the United States in Opposition ("Resp. Br."), Petitioner JANA, Inc.¹, submits this Reply to Brief in Opposition

¹ Petitioner JANA, Inc., owns stock in Hartley Metzner Huenink Communications, Inc. Petitioner has no parent company and no other subsidiaries that are not wholly owned.

solely to correct one misstatement of fact in the Respondent's Statement and two erroneous or misleading statements in Respondent's Argument. The misstatement in Respondent's Statement is addressed in this Statement of the Case; the other two misstatements are addressed in the Argument below.

Respondent's Statement described the certifications made by the Contracting Officer's Technical Representatives ("COTRs"). Resp. Br. at 4. Respondent then stated, "It is undisputed, however, that these certifications pertained only to the quality of the work, not to whether the hours billed were correct." *Ibid.* In fact, the significance of the COTRs' certification has been hotly contested at every stage of the proceedings in this case, and findings of fact favorable to Petitioner were made by the trial court in its role as finder of fact. Respondent's statement seriously distorts the record and, if uncorrected, could mislead this Court.

Prior to the Government's payment of each invoice under these contracts, the cognizant COTRs certified "that the hours specified and services described above were satisfactorily performed." Pet. App. 27a. JANA claimed (on motion for summary judgment and at trial) that the missing business records in issue here, ten years old at the time of its summary judgment motion, already had been reviewed by the COTRs at the time of the COTRs' contemporaneous certification of JANA's invoices. C.A. App. 259-60.

The Claims Court's opinion denying summary judgment reflected the existence (although, naturally, not the resolution) of this dispute. The trial judge described

JANA's argument "that the performance certifications issued by the contracting officer's technical representative establish that it worked the hours for which it sought payment from the Government." Pet. App. 48a.

At the trial, the judge resolved this issue in JANA's favor. Evidence was presented that JANA's documentation was contemporaneously reviewed by the COTRs. C.A. App. 257, 259-60. In his bench opinion, the trial judge "emphasized strongly" that "the Government [had] not borne its burden of proof in this case that pertains to these COTR certificates." The judge further stated:

Now, that means that the contracting officer or its representative is having to specify that the hours -- excuse me, to certify, that the hours specified were performed. Not just that they were performed, but they were satisfactorily performed.

Pet. App. 27a. While conceding the certificates were not "in lieu of an audit," the trial judge nevertheless went on to find:

But it means something. It was in there for some reason. It's there so that before the contractor gets a dime on any monthly invoice, somebody from the contracting officer in a position to know is going to certify that the hours were performed, and that went on month after month, invoice after invoice.

Pet. App. 28a.

The only things that should be "undisputed" about the COTRs certifications are that (i) the trial judge found,

after trial, the certifications *did* address the actual hours worked, and (ii) they were one of the factors persuading the judge that there had been no overpayment.

Summary of Argument

This Reply to Brief in Opposition is submitted only to address erroneous and misleading statements in Respondent's Brief. One of these statements, concerning the COTRs' certifications, was in Respondent's Statement and is discussed above. Respondent also alleged that JANA had an opportunity at trial to prove that the costs in issue were actually incurred but failed to do so. Resp. Br. at 13. This statement completely contradicts the trial court's findings and conclusions and, as shown below, ignores the central issue in the trial. Finally, Respondent attempted to distinguish several cases cited by Petitioner in support of a *quantum meruit* recovery on the basis that different contractual payment provisions were involved. That attempt mischaracterizes or misapprehends the theory of recovery in *quantum meruit*, which (to avoid forfeitures) permits recovery for the benefit conferred even if payment is excused under the contract.

Argument

I. THE TRIAL COURT HELD THERE WAS NO OVERPAYMENT BASED ON EVIDENCE THAT, DESPITE THE LACK OF SUBSTANTIATING DOCUMENTS, THE DISPUTED HOURS WERE WORKED

Respondent argues that JANA had full opportunity at trial to prove the disputed costs were incurred but failed to do so. Resp. Br. at 13. That statement reflects a misunderstanding of the nature of the proceeding below.

The issue addressed at trial was, simply, whether there had been any overpayment. Pet. App. 17a. The case involved the record-retention regulation, ASPR App. M, but it was not *about* that, or any other, regulation. As is clear from the trial judge's bench ruling, the issue at trial was whether JANA had worked the hours for which it had been paid. If not, the trial judge believed the Government clearly was entitled to a refund. *Ibid.* This was a question of fact for the trial judge. Although the Government tried to focus attention on the record-keeping regulation and make it a controlling question of law (Pet. App. 19a), the trial judge disagreed. The issue *he* addressed was overpayment, not substantiation.

The trial judge examined a "mosaic" of facts (Pet. App. 19a) on the issue of whether the disputed hours were worked. He explained that the burden of proof was on the Government to show the hours had not been worked since the Government was making an affirmative claim of overpayment. Pet. App. 17a-18a. On the evidence, he found the Government had not met that

burden. Pet. App. 18, 28a. One of the factors that influenced him was the COTRs' certifications, which he viewed as evidence that "the hours were performed." Pet. App. 28a.

The Government clearly viewed the key issue as being the duty to substantiate, and it may have perceived all the other evidence as a distraction or a waste of time. The trial judge, clearly, did not agree. JANA presented (*inter alia*) evidence that its records had been reviewed by the COTRs at the time of their certifications (C.A. App. 259-60), and that some delivery order items for which *no* substantiating records could be found at the time of audit had, nevertheless, been produced and accepted (C.A. App. 233-34). The fact these items were accepted is, by itself, enough to prove that at least some of the costs in issue here are for hours that *must have been* worked.

Because of his findings that there had been no overpayment, the trial judge made no attempt to quantify the benefit conferred on the Government. Pet. 19. Respondent may be confusing this lack of quantification of benefit with the question of whether the work was performed. As explained above, the trial court believed that it had been (or, at least, that the Government failed to prove by a preponderance that the underlying work had not been performed).

II. RESPONDENT'S ATTEMPT TO DISTINGUISH THE *QUANTUM MERUIT* CASES ON THE BASIS OF THE EXACT PAYMENT PROVISIONS ALLEGEDLY VIOLATED REFLECTS ITS MISAPPREHENSION OF THE NATURE OF THE RESTITUTION REMEDY

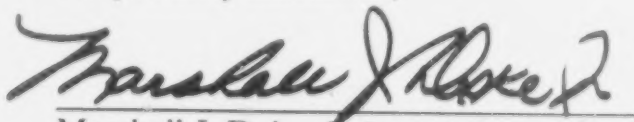
One other statement in Respondent's Brief in Opposition, while not a mischaracterization of the record, still is confusing and deserves brief mention. Respondent claims that the "express payment provisions of the time and materials contracts at issue here distinguish this case from all but one of the cases petitioner cites, in which *quantum meruit* recovery was allowed despite the invalidity of a contract or a contractor's record-keeping failures." Resp. Br. at 11. It is true that the cases Respondent mentions may not involve the precise record-keeping provisions in issue here. They were cited, however, as examples of payment in *quantum meruit* when, for whatever reason, payment could not be made under the contract. E.g., *United States v. Amdahl Corp.*, 786 F.2d 387, 393 (Fed. Cir. 1986) (in *quantum meruit* recovery, the contractor "is not compensated under the contract, but rather under an implied-in-fact contract"); *Ocean Technology, Inc. v. United States*, 19 Cl. Ct. 288, 294 (1990) (quoting *Amdahl* for the identical proposition); *National League of Cuban American Community-Based Centers*, GSBICA No. 9157-ED, 91-1 BCA ¶ 23,513 at 117,890 (accepting, *arguendo*, the Government's assertion that the contractor's breach of record-keeping requirements excused the Government's payment obligations, only the *contractual* payment obligations would be excused, not the contractor's common-law right to restitution for benefit conferred).

Respondent focuses on the express payment provisions of the contracts in issue here and argues these provisions distinguish the cited cases from the case at bar. This "distinction" is meaningless. Even if the court below properly found that JANA is not entitled to any payment under the contract because of these "express payment provisions," the issue then would be whether JANA conferred a benefit on the Government for which it should be compensated, as in the cases purportedly distinguished by Respondent.

Conclusion

For the reasons set forth above and in the Petition for Writ of Certiorari, a writ of *certiorari* should issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,



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